

**** E-filed June 22, 2010 ****

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MULTIVEN, INC., a Delaware corporation,

No. C08-05391 JW (HRL)

Plaintiff,

**REPORT AND RECOMMENDATION
ON PLAINTIFF'S AND
COUNTERDEFENDANTS'
PRODUCTION OF DOCUMENTS**

v.

CISCO SYSTEMS, INC., a California
corporation,

Defendant.

AND RELATED COUNTERCLAIMS
_____ /

BACKGROUND

Multiven, Inc. ("Multiven"), a provider of service and maintenance support for router and networking systems, sued defendant Cisco Systems, Inc., a leading provider of Internet Protocol-based networking technologies, alleging violations of the Sherman Antitrust Act as well as related state claims. Cisco Systems, Inc., along with related-entity Cisco Technology, Inc. (collectively, "Cisco"), then counterclaimed against Multiven as well as Pingsta, Inc. ("Pingsta") and Peter Alfred-Adekeye ("Adekeye"), a former Cisco employee and current Chief Executive Officer of Multiven and Pingsta (collectively, "Counterdefendants"). Cisco's counterclaims allege copyright infringement, violation of the Computer Fraud and Abuse Act, false advertising in violation of the Lanham Act, plus similar state claims.

1 Last year, Cisco served two sets of Requests for the Production of Documents on Multiven-
2 as-Plaintiff (“Plaintiff Multiven”) and Counterdefendants. (Docket No. 196 at 6.) Since that time
3 and with no end in sight, the producing parties have been reviewing and producing documents to
4 Cisco on a rolling basis in accordance with an apparent agreement to do so (although Cisco denies
5 the existence of this agreement). (Docket No. 203 at 2-3.)

6 With discovery in full swing, Cisco served deposition notices and subpoenas in January
7 2010 for (1) Multiven’s custodian of records; (2) Multiven’s Federal Rule of Civil Procedure
8 (“FRCP”) 30(b)(6) deponent; (3) Adekeye; (4) Adekeye’s wife Deka Yussuf (“Yussuf”); (5)
9 Pingsta’s custodian of records; and (6) Pingsta’s FRCP 30(b)(6) deponent. (*Id.* at 3.) These
10 subpoenas requested substantially the same documents as those requested by Cisco’s two earlier sets
11 of Requests for Production of Documents served months before. (*Id.*) As depositions approached,
12 Cisco filed a motion to compel the production of these documents (Docket No. 196), which this
13 Court granted in part and denied in part. (Docket No. 240.)

14 Nevertheless, Plaintiff Multiven and Counterdefendants are nowhere near finished with their
15 review and production of documents responsive to Cisco’s requests. And with the September 27
16 discovery deadline looming, something must be done.

17 DISCUSSION

18 A. The Timing of Production and Retention of a Third Party Vendor

19 Despite their efforts, it has become clear to this Court that Plaintiff Multiven and
20 Counterdefendants cannot complete their review and production of documents with enough time
21 before the close of discovery to allow Cisco time to actually do anything with them. Plaintiff
22 Multiven and Counterdefendants so far have insisted on a review process that guarantees that they
23 will not finish this extensive project in any reasonable amount of time. Early on, Plaintiff Multiven
24 and Counterdefendants rejected the idea of using an outside vendor to help search and narrow their
25 electronically-stored information on account of the cost. So up to now Plaintiff Multiven and
26 Counterdefendants have not used search terms to narrow the amount of data to be reviewed.
27 Instead, they have been using approximately five attorneys to review every bit of that giant mass of
28 information for responsive documents. Knowingly this, it is no surprise that counsel for

1 Counterdefendants stated that it would take, at a minimum, two or three more months to finish the
2 document review. This is far too long and a new method for this review and production is needed.

3 To that end, and regardless of Plaintiff Multiven's and Counterdefendants' earlier
4 misgivings, Cisco requests an order directing the parties to retain a third party vendor to assist with
5 the further collection, search, review, and production of documents. Cisco has even offered to pay
6 for half of the cost of doing so, and Plaintiff Multiven and Counterdefendants are amenable to this
7 option.¹ (Docket No. 207 at 10; Docket No. 224 at 4.) Given the parties' desire and willingness to
8 retain a third party vendor to expedite this prolonged process, this Court will not stand in their way.
9 Because something must be done, this Court recommends that the District Court order the parties to
10 promptly retain a third party vendor to assist with this increasingly perilous situation.

11 B. The Appointment of a Special Master

12 In addition to the sluggishness of Plaintiff Multiven's and Counterdefendants' review and
13 production of documents, this Court is pessimistic about the parties' ability to resolve further
14 discovery issues without some sort of judicial intervention. Indeed, the parties have already resorted
15 to this Court to resolve a number of discovery disputes. And the moving papers related to Cisco's
16 recent motion to compel (Docket No. 196) indicate that there are several more problems on the
17 horizon.

18 First, Cisco contends that Plaintiff Multiven's and Counterdefendants' document collection
19 protocol is flawed. (Docket No. 221 at 2.) Cisco states, for example, that Yussuf owns a MacBook
20 computer which arguably could contain relevant documents, but counsel for Plaintiff Multiven and
21 Counterdefendants have not forensically imaged this computer's hard drive. (*Id.*) Cisco also claims
22 that other email addresses mentioned by Adekeye in his depositions have not been searched by
23 Plaintiff Multiven and Counterdefendants. (*Id.*) While counsel for Plaintiff Multiven and
24 Counterdefendants have said that these sources would be searched in due course if necessary, Cisco
25 has not found this response encouraging.

26
27
28 ¹ Although ordinarily the Court might suggest that Plaintiff Multiven and Counterdefendants pay for
a court-ordered third party vendor since it is they who are slow in producing documents, Cisco has
offered to cover half of the cost. The Court has no problem with this arrangement, though.

1 Second, even with the retention of a third party vendor, the parties have indicated that there
2 may be difficulties related to how best to narrow the scope of the document review. The parties
3 specifically identified problems surrounding the numerous document requests, the selection of
4 appropriate search terms, and the de-duplication of documents.

5 Third, the parties disagree about the scope and production of privilege logs. Neither side has
6 produced one so far (although Cisco states that it plans to do so by June 30), and Plaintiff Multiven
7 and Counterdefendants do not believe that it is necessary to log every communication with outside
8 counsel as they say Cisco requested. (Docket No. 221 at 3-4; Docket No. 224 at 4.)

9 In light of the past failures of the parties to resolve discovery issues amicably and given that
10 the final months of discovery are here and are likely to include further disagreement, this Court
11 suggested that it might be appropriate for a Special Master to be appointed to resolve further
12 discovery disputes. The parties agreed, consented to a Special Master, and expressed a desire to use
13 Special Master George C. Fisher, previously appointed by the District Court in this case. The Court
14 believes this to be the most effective course of action and, accordingly, recommends that the District
15 Court expand Special Master Fisher's duties to include full authority to choose a third party vendor
16 (if the parties cannot agree on one), craft a search protocol, establish deadlines, and otherwise
17 resolve any future discovery disputes or objections in this case pursuant to FRCP 53.

18 RECOMMENDATION

19 For the foregoing reasons, this Court recommends as follows:

- 20 1. Per the parties' agreement, that the District Court order the parties to retain a third party
21 vendor to assist with the further collection, search, review, and production of documents and
22 that Cisco pay for half of the cost and Plaintiff Multiven and Counterdefendants pay for the
23 other half; and
 - 24 2. That the District Court expand Special Master Fisher's duties to include full authority to
25 choose a third party vendor (if the parties cannot agree on one), craft a search protocol,
26 establish deadlines, and otherwise resolve any future discovery disputes or objections in this
27 case pursuant to FRCP 53.
- 28

Pursuant to Federal Rule of Civil Procedure 72(b), any party may serve and file objections to this Report and Recommendation within fourteen days after being served.

IT IS SO ORDERED.

Dated: June 22, 2010



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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